> Thuston already had been provided the cause and grounds to initiate the prosecution based on the videotape, his mission in visiting the property was not as an investigator but as an advocate. *Id.* at 274.

Pennington v. Penner, 207 F. Supp. 2d 1225, 1235 (D. Kan. 2002)(Citations omitted).

In a *Bivens*[3] lawsuit for malicious prosecution, the DC Circuit found that the federal prosecutors lost their absolute immunity under rather extraordinary facts:

> In the two complaints Moore alleged that Valder and the postal inspectors maliciously prosecuted him, even though they knew that he was unaware of the fraud, based on his and REI's criticism of USPS procurement policies and on his recommendations to the President of qualified candidates for Postmaster General. In addition, Moore alleged other misconduct, including claims that Valder told several postal inspectors in the presence of a grand jury witness that he did not care whether Moore was in fact guilty because he wanted to secure a "high-profile" indictment to further his career; that Valder and the postal inspectors intimidated and coerced witnesses into changing their testimony to incriminate Moore; that they concealed evidence of Moore's innocence; that they manipulated witness testimony and presented to the grand jury false, incomplete and misleading written witness statements; that they lost, destroyed or concealed from the grand jury exculpatory information; that they disclosed grand jury testimony to third parties; and that Valder withheld material exculpatory information from Moore after indictment.

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[3] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (U.S. 1971) which generated a class of lawsuits similar to § 1983 claims. These two types of lawsuits differ in that a § 1983 claim redresses the violation of a federally or constitutionally protected right by a government agent acting "under color of state law," whereas a *Bivens* action vindicates the deprivation of a right by an official acting "under color of federal law."

Moore v. Valder, 65 F.3d 189, 211-214 (D.C. Cir. 1995)

The D.C. Circuit, like the challenged opinion, concluded that intimidating and coercing witnesses was not advocatory no matter when it may occur.

> Valder, however, has not met his burden of establishing that absolute immunity protects him from potential liability for the other instances of misconduct alleged by Moore. Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution.

Moore v. Valder, 314 U.S. App. D.C. 209 (D.C. Cir. 1995)

This results-oriented approach does not comport with *Imbler* or *Buckley*, but seemingly has occurred as the result of an overbroad interpretation of footnote 5 in *Buckley*. This interpretation completely ignores probable cause.

II. THE NINTH CIRCUIT IS WRONG IN ITS ANALYSIS OF ABSOLUTE IMMUNITY

The prosecutor in this case did not go beyond the bounds of his advocacy role despite implications in the challenged opinion which suggests otherwise.[4] There is nothing in the record to suggest that Longanbach or O'Brien knew that the interviews were not related to the advocate's role in the presentation of evidence at a preliminary hearing scheduled for a future date. A

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[4] At this time, the preliminary hearing at which the judge would decide whether there was probable cause to hold Genzler for trial in superior court was still over a month away.
Genzler v. Longanbach, 410 F.3d 630, 640 (9th Cir. 2005)
When Longanbach and O'Brien met with Flanders, the preliminary hearing at which the court would determine whether there was probable cause for Genzler to stand trial was still more than three weeks away.
Genzler v. Longanbach, 410 F.3d at 642

prosecutor should speak to a witness early in the process in order to determine what charges to file, to assess the witness' credibility and to allow the DA investigator to prepare a report of the interview to disclose to the defense. The prosecutor, charged with seeking justice, *Berger v. United States* 295 U.S. 78, 88 (1935), protects both society and the accused by review, preparation and advocacy at all stages of a criminal prosecution.

The Ninth Circuit was wrong in its interpretation of *Buckley*, partly due to a misunderstanding of criminal procedure in California. It was stipulated below that the defendant, Genzler, had been arrested based on sufficient probable cause when all the interviews occurred in this case. The Ninth Circuit repeatedly points out in the challenged opinion that DDA Longanbach and DA Investigator O'Brien's interview of Flanders after the complaint was filed occurred more than a month before the preliminary hearing. The inference intended by the court is that the interview was not useful in preparing for a preliminary hearing which was weeks away. A trial deputy must prepare for a preliminary hearing which usually occurs within 10 court days. There is no indication that the prosecutor knew in advance of the interview that the preliminary hearing would not occur within ten court days, the statutorily mandated time for such a hearing when a defendant is in custody. Cal. Penal Code §859b.(West 2003) A prosecutor assigned to a complex case cannot afford to wait to interview witnesses on the assumption that defense counsel will request a continuance.

It was stipulated in the lower court, that when all the interviews occurred, probable cause already existed to arrest Genzler. Thus, the interviews would appear to be on the advocacy side of the bright-line described in *Buckley*.

> We expressly stated that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," and are nonetheless entitled to absolute immunity. We noted in particular that an out-of-court "effort to control the presentation of [a] witness' testimony" was entitled to absolute immunity

> because it was "fairly within [the prosecutor's] function as an advocate."

Buckley v. Fitzsimmons, 509 U.S. 259, 273-274 (1993)(Citations omitted.)

The challenged opinion also mischaracterized DA Investigator O'Brien's initial interview of Flanders as investigatory partly because it may have occurred after Genzler was arrested, again based on sufficient probable cause and before the complaint was filed. Genzler was in custody and had given a statement to the police when O'Brien proceeded to interview Flanders. This interview may have occurred before the complaint was filed, but it was held after she gave a video-taped statement to the police. It did not advance the police investigation at that stage to re-interview Flanders. The Ninth Circuit's mistaken view was based partly on the fact that O'Brien was accompanied by the Detective investigating the murder. O'Brien was conducting his interview at the request of the trial deputy. He was not seeking new clues to arrest new suspects. O'Brien was interviewing a percipient witness with the assistance of someone presumably knowledgeable about the case and the parties; someone familiar to the witness who could spot discrepancies or inconsistencies and point them out to O'Brien immediately. His presence assisted O'Brien and Longanbach in assessing the witness' statements for charging and trial preparation. The charging process had begun and a decision had to be made whether the offense was a murder, manslaughter or no offense at all due to the possibility of self-defense. The presence of an extra witness at an interview is often desirable if the need arises to present testimony for impeachment purposes. If O'Brien had been sick, injured, on vacation or dead, the statement could have been presented through the detective.

While the prosecutor's actions in this case should be accorded absolute immunity based on the analysis in *Buckley*, it is equally important for the Court to clarify *Buckley's* "bright-line" analysis in conjunction with footnote 5 of that opinion to encompass absolute immunity for interviews of witnesses and victims in preparation for complaint filing and preliminary

hearings. To do otherwise will reduce veteran prosecutors to a passive role subordinate to police officers.

As footnote 5 of *Buckley* indicates, post-probable cause activity does not insulate the prosecutor if the activities are investigative in function. In this case, the interviews were alleged, by Genzler, to be coercive in attempting to encourage Flanders to shift her testimony to assist in convicting Genzler. They were not alleged to be investigative. Overzealous questioning either in preparation for a trial or a hearing is entitled to absolute immunity. *Lee v. Willins*, 617 F.2d 320 (2d Cir. 1980), *Cousin v. Small*, 325 F.3d 627, *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978)

CONFLICTING OPINIONS WITHIN THE NINTH CIRCUIT

In *Broam v. Bogan*, 320 F.3d 1023 (2003), the Ninth Circuit closely examined the chronology of when probable cause existed to arrest the defendant before determining initially if absolute immunity applied.

> A more detailed statement of the facts with indications of whether they occurred before arrest on these charges would enable the court to make a determination of whether the complaint states one or more claims for relief.

Broam v. Bogan, 320 F.3d at 1029

This request for a chronology would have been unnecessary in the challenged opinion because it was stipulated below that probable cause existed to arrest Genzler before the interviews in question occurred.

> To determine whether a state law enforcement officer or a prosecutor is entitled to qualified, as opposed to absolute, immunity a court must decide whether the alleged unconstitutional conduct occurred during the performance of an investigative function. Examples of when a law enforcement officer performs an investigative function include gathering physical evidence and conducting interrogations to determine whether a crime has

> been committed and whether probable cause exists to arrest a suspect.

Broam v. Bogan, 320 F.3d at1031

Recognizing that some investigative acts could occur after probable cause was established as in footnote 5 of *Buckley*, the Ninth Circuit described some purely investigative acts based on an *Imbler* function test.

> However, even after the initiation of criminal proceedings, a prosecutor may receive only qualified immunity when acting in a capacity that is exclusively investigatory or administrative. See, e.g., *Buckley*, 509 U.S. at 274 n.5 (stating that "of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination, as the opinion dissenting in part, points out, a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity") (citation omitted); *Guzman-Rivera v. Rivera-Cruz,* 55 F.3d 26, 28 (1st Cir. 1995) (holding that the prosecutors were not "entitled to absolute immunity for any delays or inadequacies in their conduct of the investigation" after § 1983 plaintiff had been convicted, but that "they [were] absolutely immune for their post-investigation failure to go into court to seek Guzman's release"); *Houston v. Partee*, 978 F.2d 362, 367 (7th Cir. 1992) (holding that when prosecutors who, after conviction of criminal defendant, acting solely as investigators, acquired and withheld exculpatory evidence after their role in the prosecution had ended are "not entitled to any more immunity than the defendant police officers"); *Robichaud v. Ronan*, 351 F.2d 533, 535 (9th Cir. 1965) (holding that prosecutors who, soon after arrest of suspect, allegedly directed police to coerce confession from suspect, were not entitled to absolute immunity because interrogation is ordinarily a police activity).

Broam v. Bogan, 320 F.3d at 1031

Another case, *KRL v. Moore*, 384 F.3d 1105 (9th Cir. 2004), which conflicts with the challenged opinion was decided by the Ninth Circuit itself. A search warrant was conducted at the request of the prosecutors after the indictment, before trial, in an attempt to gather new evidence in the existing case and seek evidence of new crimes.

> The Supreme Court has not addressed whether a prosecutor is entitled to absolute immunity when assisting with the acquisition of evidence pursuant to a post-indictment search warrant. We have concluded, however, that "prosecutors are absolutely immune from liability for gathering additional evidence after probable cause is established or criminal proceedings have begun when they are performing a quasi-judicial function." *Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003). The existence of probable cause at the time of the prosecutor's alleged unconstitutional conduct must be considered because "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274 (footnote omitted). However, a prosecutor can still perform "police investigative work" after probable cause has been established, for which only qualified immunity would apply. *Id.* at 274 n.5; see also *Imbler*, 424 U.S. at 431 n.33; *Broam*, 320 F.3d at 1031. Thus, the timing of the prosecutor's conduct informs our determination of the function performed, but it is not determinative. See *Cousin v. Small*, 325 F.3d 627, 636 (5th Cir. 2003) ("What Cousin fails to acknowledge, however, is that the timing of events, while not determinative, can be highly relevant to the inquiry into function." (footnote omitted)).
>
> Here, the second search warrant had two goals: it sought evidence to prosecute the pending

> indictment against Womack, and it sought to investigate and uncover new crimes.

KRL v. Moore, 384 F.3d at, 1111

Because one of the goals in *KRL* was to prepare for trial in the pending case, absolute immunity was deemed appropriate due to its advocacy nature. One of the acknowledged goals was also to seek evidence for additional counts but the advocacy role was preserved. In the challenged opinion, the Ninth Circuit conceded the advocacy roles of the interviews also but inexplicably rejected absolute immunity in a case where no new charges were being sought.

> We recognize that the two meetings with Flanders described *here were to some degree related to trial preparation,* even when viewed in the light most favorable to Genzler.

Genzler v. Longanbach, 410 F.3d 630, 643 (emphasis added)

As noted in the following section, the California Court of Appeals addressed the same issue as the Ninth Circuit and reached an opposite conclusion.

> "...Preparing to initiate a prosecution may necessitate obtaining, reviewing and evaluating evidence; absolute immunity may attach when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court.'". Accordingly, a prosecutor enjoys absolute immunity from civil suit for such conduct.

Falls v. Superior Court, 42 Cal. App. 4th 1031,1046 (Cal. Ct. App. 1996) citing *Gensburg v. Miller*, 31 Cal. App. 4th 512, 523 (Cal.Ct.App. 1994)

It should be emphasized that in the challenged opinion, all of the actions by O'Brien and Longanbach occurred after it was stipulated that probable cause existed to charge Genzler.

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III. THE NINTH CIRCUIT'S CHALLENGED OPINION WILL NEGATIVELY IMPACT THE CRIMINAL JUSTICE SYSTEM AT EVERY LEVEL

Buckley as interpreted by California state courts provides absolute immunity for prosecutors interviewing witnesses in preparation for preliminary hearings or trial. Witness interviews, even at the pre-complaint stage, have always been construed as an essential part of the advocate's function.

> We hold that a prosecutor acts within his official capacity when he subpoenas a witness or prepares for a postcharging hearing, such as a preliminary hearing, by interviewing a witness and encouraging the witness to testify. (See *Buckley v. Fitzsimmons, supra,* 509 U.S. 259, 272-273 [125 L. Ed. 2d 209, 226] ["We expressly stated [in *Imbler v. Pachtman*] that 'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,' and are nonetheless entitled to absolute immunity [Citation] We noted in particular that an out-of-court 'effort to control the presentation of [a] witness' testimony' was entitled to absolute immunity because it was 'fairly within [the prosecutor's] function as an advocate.' . . . We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity."]; *McMartin v. Children's Institute International, supra*, 212 Cal. App. 3d 1393 [child care custodians interviewed possible victims of sexual molestation prior to charges being filed]; *Fisher v. Pickens, supra*, 225 Cal. App. 3d 708 [probate court investigator interviewed witnesses and gathered evidence in a conservatorship matter]; *Williams v. Hartje, supra*, 827 F.2d 1203 [in preparation for a coroner's

> inquest a prosecutor interviewed a jail inmate to discourage his testimony]; *Marx v. Gumbinner, supra,* 855 F.2d 783 [precharging, a prosecutor interviewed a four-year-old suspected rape victim]; *Howard v. Drapkin, supra*, 222 Cal. App. 3d 843 [in a family law dispute, a psychologist interviewed a spouse for six hours]; *Gensburg v. Miller, supra*, 31 Cal. App. 4th 512, 523

Falls v. Superior Court, 42 Cal. App. 4th at 1045-1046

Interviewing witnesses in preparation for filing a complaint is crucial in determining whether to file charges and what charges to file.

> The decision of whether or not to charge involves a delicate balancing of, not only the facts of a given case that inform the issue of probable cause, but also a number of policy considerations, such as the heinousness of the crime, the criminal records, if any, of the suspect, the likelihood of sustaining the government's burden at trial, and the amount of resources that the prosecutor will have to devote to this particular case, see generally Uviller, The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the A.B.A., 71 Mich.L.Rev. 1145 (1973); Davis, Discretionary Justice (1969). Our criminal justice system has seen fit to leave these difficult decisions in the purview of the public prosecutor, and thereby entrusts in him a tremendous power to adversely affect the lives of our citizenry. This system contemplates that persons who will ultimately be found innocent of wrongdoing will nonetheless be forced to defend themselves against criminal charges, and thereby incur substantial expenses and damage to their reputations, even if acquitted. It is the recognition of this power which we entrust in the prosecutor, with its concomitant potential for arousing the wrath of persons who feel that they have been wrongly charged, that has compelled the courts to

> confer absolute immunity upon prosecutors for their activities in this sphere.

Schieb v. Humane Soc. of Huron Valley, 582 F. Supp. 717, 722-723 (D. Mich. 1984)

Prosecutors should not be subject to vexatious litigation any time they interview a witness. Such exposure may compel prosecutors to forego witness interviews. Such abstention would certainly eliminate exposure to civil litigation. The cautious prosecutor would instead rely on police accounts of interviews in making a filing decision. Witnesses would not be challenged by the careful questioning of experienced prosecutors and potentially innocent persons would be subject to prosecution. The criminal justice system would thereby be seriously compromised. As this Court has correctly noted:

> A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages. Cf. American Bar Association Project on Standards for Criminal Justice, Prosecution and Defense Function § 3.9 (c) (Approved Draft 1971).

Imbler v. Pachtman, 424 U.S. at 426, n.24

The traditional role of an advocate requires that witnesses be interviewed.

> Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses

State v. Earp, 319 Md. 156, 162, 571 A.2d 1227. (1990)

Interviewing victims has consistently been recognized in federal courts as crucial to the criminal justice system,

> We begin with the observation that to grant a prosecutor absolute immunity for the decisions to initiate and pursue a prosecution while subjecting him to liability for action taken to secure the information necessary to make those decisions

> "would only foster uninformed decision making and needless actions." *Forsyth v. Kleindienst,* 599 F.2d 1203, 1215 (3d Cir. 1979), cert. denied, 453 U.S. 913, 101 S. Ct. 3147, 69 L. Ed. 2d 997 (1981). Our own court has held that "a prosecutor is entitled to absolute immunity for the factual investigation necessary to prepare a case." *Mullinax v. McElhenney,* 817 F.2d 711, 715 (11th Cir. 1987). Such investigation, we have held, includes interviewing witnesses before presenting them to the grand jury. See *Cook v. Houston Post,* 616 F.2d 791, 793 (5th Cir. 1980). *Surely, it also includes interviewing the victim of the crime.*

Marx v. Gumbinner, 855 F.2d 783, 792 (11th Cir. 1988) (emphasis added)

Thus an important function protecting all parties, particularly the accused, would be discarded as an unintended consequence of the challenged opinion.

> A hallmark of effective judicial process is the care taken to ensure that nobody is erroneously charged, arrested, or incarcerated.

Rivera v. Leal, 359 F.3d 1350, 1354 (11th Cir. 2004)

> In this way, Buckley's proffered standard would have the perverse effect of encouraging, rather than penalizing, carelessness, and *it would discourage early participation by prosecutors in the criminal justice process.*

Buckley v. Fitzsimmons, 509 U.S. at 283 (Kennedy, J. dissenting) (emphasis added) (citations omitted)

Granting certiorari in this petition would allow this Court to rectify the error in the challenged opinion. More importantly, this is an opportunity to clarify the importance of attaching absolute immunity to the prosecutor's role in interviewing witnesses in preparation for any prosecutorial function after probable cause to arrest has attached.

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CONCLUSION

Footnote 5 of the *Buckley* decision has left the door open to a results-based analysis whenever a former defendant alleges in his pleadings that a prosecutor suborned perjury during witness interviews. The desire to right a perceived egregious wrong has driven the Ninth Circuit to redefine interviews, after probable cause is conceded to exist, as investigative. Any party who suborns perjury, including prosecutors, is guilty of a felony and should be prosecuted. Removing absolute immunity from all conscientious prosecutors conducting witness interviews will not eliminate this crime but will severely diminish prosecutorial discretion at a critical stage of a criminal prosecution.

For the reasons stated above, amicus urges this Court to grant prosecutors absolute immunity for interviewing witnesses in a prosecutorial function after probable cause to arrest has attached, and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

STEVE COOLEY
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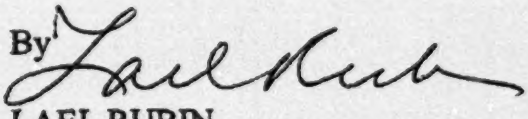
By 

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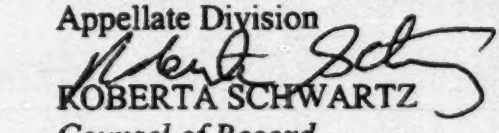

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